

AN EXAMINATION

INTO THE VALIDITY OF THE NEW JERSEY SENATORIAL ELECTION OF MARCH 15, 1865.

By the Constitution of the United States, Art. I, Sec. 3, "the Senate of the United States shall be composed of two Senators from each State, chosen by the *Legislature* thereof for six years."

Article I, section 4: "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof," &c.

By the Constitution of the State of New Jersey, Article IV, Section 1, the Legislature of the State is composed of a Senate and General Assembly, meeting separately in some instances, (Article IV, clause 1, clause 3,) and in others in joint meeting, (Article IV, section 5, clause 1.) In the latter clause, called "the Legislature in joint meeting;" in Article V, clause 2, "both houses in joint meeting," and in Article 7, section 2, clause 2, clause 3, "the Senate and General Assembly in joint meeting."

By the Statute of New Jersey entitled "An act to prescribe the manner of appointing Senators of the United States on the part of this State," it is enacted "that Senators of the United States on the part of this State shall be appointed by the Senate and General Assembly of this State in joint meeting assembled," and no further provision is contained in any statute of the State regulating the choice of Senators, except in case of vacancy, when the Governor may appoint.

By the second section of the same act the Governor is required to commission, under the great seal of the State, every person who shall be elected a Senator.

The Senatorial term of Hon. John C. Ten Eyck, Senator of the United States from the State of New Jersey, expired on the 4th day of March, in the year 1865. The Legislature of New Jersey assembled on the 10th day of January, in the year 1865, and it became its duty to choose a Senator in his stead to represent the State in the Senate of the United States.

To conform to the statute last stated in the choosing of the Senator, a joint meeting became necessary. Accordingly, soon after the meeting of the Legislature, on the 8th day of February, 1865, the Senate passed the following resolution :

“Resolved, That the Secretary be directed to inform the House of Assembly that the Senate will be ready to go into joint meeting for the appointment of a United States Senator, State Treasurer, and such other State and County Officers as may be necessary, on the 15th day of February, instant, at three o’clock, P. M., in the Assembly Chamber,

“In which the concurrence of the House of Assembly is requested.”

On the same day, the said resolution was sent to the House of Assembly, as follows :

“The following message from the Senate was received by the hands of their Secretary :

“SENATE CHAMBER, February 8th, 1865.

“Mr. Speaker :—I am directed by the Senate to inform the House of Assembly that the Senate has passed the following concurrent resolution :

“Resolved, That the Secretary be directed to inform the House of Assembly that the Senate will be ready to go into joint meeting for the appointment of United States Senator, State Treasurer, and such other State and County Officers as may be necessary, on the 15th day of February, inst., at 3 o’clock, P. M., in the Assembly Room.

“In which the concurrence of the House of Assembly is requested.

“JOHN H. MEEKER, Secretary of the Senate.”

On the 14th day of February, 1865, the following entry appears in the House Journal:

“The resolution from the Senate relative to joint meeting was taken up and concurred in.”

The following is the Journal of the Joint Meeting:

IN JOINT MEETING.

STATE OF NEW JERSEY, ASSEMBLY CHAMBER, }
TRENTON, February 15, 1865. }

At half-past three o'clock, P. M., the Senate and General Assembly met in Joint Meeting in the Assembly Chamber, for the purpose of making sundry appointments: of United States Senator, State, County and Township Officers.

Hon. Joseph T. Crowell nominated Hon. Edward W. Scudder for Chairman of the Joint Meeting.

Which was unanimously agreed to

On motion of Mr. Holsman, John H. Meeker was appointed Secretary of the Joint Meeting.

On motion of the same Senator, George B. Cooper was appointed Assistant Secretary.

Under the direction of the Chairman the Secretary called the Joint Meeting, as follows:

Messrs. Abbett, L., Abbott, N. S., Acton, Allen, Anderson, Bates, Beesley, Birdsall, Blauvelt, Bodine, Boss, Brinck, Broking, Buckley, Callahan, Chandler, Clever, Corey, Coriell, Crowell, Culver, Demarest, Dickeson, Doughty, Dougherty, Duryea, Fisher, Goble, Green, Haring, Harrison, Heulings, Hoagland, Hoffman, Holmes, Holsman, Horner, Iliff, W. J., Iliff, W. M., Irick, Jarrard, Jenkins, Kearney, Kennedy, Kinter, Lake, Landell, Lathrop, Lighthipe, Little, Ludlam, Martin, Moore, Nicholson, Nixon, Peddic, Randolph, Reeves, Robins, Robison, Schenck, Scovel, Scudder, Seiffert, Staats, Stille, Stockton, Taylor, Treadwell, Trusdell, Van Buskirk, Van Vorst, Van Wagoner, Ware, Weart, Willever, Wilson, Wright, Wurts, Young—80.

Mr. Holsman moved that the rules of the last Joint Meeting be adopted for the government of this Joint Meeting, except the sixteenth rule, for which he offered the following resolution:

Resolved, That no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both houses of the Legislature.

Which was agreed to.

[The said sixteenth rule of the last Joint Meeting was as follows:—"16. That all candidates for office, upon receiving a majority of the votes CAST by this Joint Meeting, shall be declared to be duly elected."]

On motion of Mr. Holsman, the resolution under which the Joint Meeting was called, was read, as follows:

Resolved, That the Secretary be directed to inform the House of Assembly that the Senate will be ready to go into Joint Meeting for the appointment of United States Senator, State Treasurer, and such other State and County Officers as may be necessary, on the 15th day of February, instant, at 3 o'clock, P. M., in the Assembly, in which the concurrence of the House of Assembly is requested.

Mr. Ludlam moved to proceed to the election of a United States Senator.

Mr. Holsman moved to amend by postponing the same until the 1st day of March next.

Mr. Scovel moved further to amend by postponing the same until the 7th day of March next.

Upon which the yeas and nays were taken, as follows:

In the affirmative, were Messrs. Abbott, N. S., Acton, Bates, Birdsall, Blauvelt, Bodine, Buckley, Callahan, Clever, Crowell, Dickeson, Fisher, Green, Jarrard, Lake, Robison, Scovel, Staats, Ware, Wright—20.

In the negative, were Messrs. Abbett, L., Allen, Anderson, Boss, Brinck, Broking, Chandler, Corey, Coriell, Culver, Demarest, Doughty, Dougherty, Duryea, Goble, Haring, Harrison, Heulings, Hoagland, Hoffman, Holmes, Holsman, Horner, Iliff, W. J., Iliff, W. M., Irick, Jenkins, Kearney, Kennedy, Kinter, Landell, Lathrop, Lighthipe, Little, Ludlam, Martin, Moore, Nicholson, Nixon, Peddie, Randolph, Reeves, Robins, Schenck, Scudder, Seiffert, Stille, Stockton, Taylor, Treadwell, Trusdell, Van Buskirk, Van Vorst, Van Wagoner, Weart, Willever, Wilson, Wurts, Young—59.

So said amendment to the amendment was not agreed to.

The yeas and nays then being taken upon the amendment offered by Mr. Holsman, resulted as follows:

In the affirmative, were Messrs. Abbett, L., Acton, Allen, Anderson, Boss, Broking, Chandler, Corey, Coriell, Culver, Demarest, Dickeson, Doughty, Dougherty, Duryea, Goble, Haring, Hoagland, Hoffman, Holmes, Holsman, Iliff, W. J., Iliff, W. M., Jenkins, Kearney, Kennedy, Kinter, Little, Martin, Randolph, Robins, Schenck, Scudder, Seiffert, Stille, Taylor,

Treadwell, Trusdell, Van Buskirk, Van Vorst, Ware, Weart, Willever, Wurts, Young—45.

In the negative, were Messrs. Abbott, N. S., Bates, Birdsall, Blauvelt, Bodine, Brinck, Buckley, Callahan, Clever, Crowell, Fisher, Green, Heulings, Harrison, Horner, Irick, Jarrard, Lake, Landell, Lathrop, Lighthipe, Ludlam, Moore, Nicholson, Nixon, Peddie, Reeves, Robison, Scovel, Staats, Stockton, Van Wagoner, Wilson, Wright—34.

So said amendment was agreed to.

On motion of Mr. Holsman, it was

Resolved, That when this Joint Meeting adjourn it adjourn to meet on Wednesday, March 1st, at 3 P. M.

[After appointing a large number of State officers, “On motion of Mr. Holsman, the Joint Meeting adjourned.”]

IN JOINT MEETING.

ASSEMBLY CHAMBER. }
WEDNESDAY, March 1, 1865. }

At 3 o'clock, P. M., the adjourned Joint Meeting came to order in the Assembly Chamber.

Under the direction of the Chairman the Secretary called the Joint Meeting, when the following gentlemen answered to their names :

Messrs. Abbett, L., Abbott, N. S., Acton, Allen, Anderson, Bates, Beesley, Birdsall, Blauvelt, Bodine, Boss, Brinck, Broking, Buckley, Callahan, Chandler, Clever, Corey, Coriell, Crowell, Culver, Demarest, Dickeson, Doughty, Dugherty, Duryea, Edsall, Fisher, Goble, Green, Haring, Harrison, Heulings, Hoagland, Hoffman, Holmes, Holsman, Horner, Iliff, W. J., Iliff, W. M., Irick, Jarrard, Jenkins, Kearney, Kennedy, Kinter, Lake, Landell, Lathrop, Lighthipe, Little, Ludlam, Martin, Moore, Nicholson, Nixon, Peddie, Reeves, Robins, Robison, Schenck, Scovel, Scudder, Seiffert, Staats, Stille, Stockton, Taylor, Treadwell, Trusdell, Van Buskirk, Van Vorst, Van Wagoner, Ware, Weart, Willever, Wilson, Wright, Wurts, Young—80.

Mr Holsman moved that the consideration of the election of United States Senator be postponed until the 15th day of March inst.

The yeas and nays being demanded and ordered upon the question of agreeing thereto, were as follows :

In the affirmative, were Messrs. Abbett, L., Anderson, Allen, Boss, Broking, Chandler, Corey, Coriell, Culver, Demarest, Doughty, Dougherty, Duryea, Edsall, Goble, Haring, Hoagland, Hoffman, Holmes, Holsman, Iliff, W. J., Iliff, W. M., Jenkins, Kearney, Kennedy, Kinter, Little, Martin, Robins, Schenck, Scovel, Scudder, Seiffert, Stille, Taylor, Treadwell, Trusdell, Van Buskirk, Van Vorst, Weart, Willever, Wurts, Young—43.

In the negative, were Messrs. Abbott, N. S., Acton, Bates, Beesley, Birdsall, Blauvelt, Bodine, Brinck, Buckley, Callahan, Clever, Crowell, Dickeson, Fisher, Green, Harrison, Heulings, Horner, Irick, Jarrard, Lake, Landell, Lathrop, Lighthipe, Ludlam, Moore, Nicholson, Nixon, Peddié, Reeves, Robison, Staats, Stockton, Van Wagoner, Ware, Wilson, Wright—37.

So said motion was agreed to.

Mr. Holsman moved that when this Joint Meeting adjourns it be to meet on the 15th day of March, inst.

[After appointing several State officers, "On motion of Mr. Holsman the Joint Meeting then adjourned."]

IN JOINT MEETING.

ASSEMBLY CHAMBER, }
WEDNESDAY, March 15, 1865. }

At 3 o'clock, P. M., the adjourned Joint Meeting came to order in the Assembly Chamber.

Under the direction of the Chairman the Secretary called the Joint Meeting, when the following gentlemen answered to their names :

Messrs. Abbett, L., Abbott, N. S., Acton, Allen, Anderson, Bates, Beesley, Birdsall, Blauvelt, Bodine, Boss, Brinck, Broking, Buckley, Callahan, Chandler, Cleaver, Cory, Coriell, Crowell, Culver, Demarest, Dickeson, Doughty, Dougherty, Duryea, Edsall, Fisher, Goble, Green, Haring, Harrison, Heulings, Hoagland, Hoffman, Holmes, Holsman, Horner, Iliff, W. J., Iliff, W. M., Irick, Jarrard, Jenkins, Kearney, Kennedy, Kinter, Lake, Landell, Lathrop, Lighthipe, Little, Ludlam, Martin, Moore, Nicholson, Nixon, Peddie, Randolph, Reeves, Robins, Robison, Schenck, Scovel, Scudder, Seiffert, Staats, Stille, Stockton, Taylor, Treadwell, Trusdell, Van Buskirk, Van Vorst, Van Wagoner, Ware, Weart, Willever, Wilson, Wright, Wurt, Young—81.

[It will be noticed, that at the call of the Joint Meeting at its

first session, only eighty members answered to their names. There was a vacancy in the Legislature at that time, occasioned by the death of Mr. Fowler, a member from Sussex. Prior to the election of Mr. Stockton, however, Mr. Edsall was elected to fill that vacancy; thus completing the full numerical strength of the Legislature present and voting on this occasion.]

Mr. Holsman offered the following resolution, and moved its adoption:

Resolved, That the resolution that no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both Houses of the Legislature be rescinded, and that any candidate receiving a plurality of votes of the members present shall be declared duly elected.

Mr. Ludlam moved that the question be divided.

The Chairman ruled said motion out of order, the Secretary having commenced to call the roll upon the adoption of said resolution.

Whereupon, Mr. Crowell appealed from the decision of the Chair.

Upon the question, shall the decision of the Chair be sustained? The yeas and nays being taken resulted as follows:

In the affirmative, were

Messrs. Abbett, L., Abbott, N. S., Acton, Allen, Anderson, Beesley, Blauvelt, Boss, Broking, Buckley, Callahan, Chandler, Corey, Coriell, Culver, Demarest, Doughty, Dougherty, Duryea, Edsall, Fisher, Goble, Green, Haring, Harrison, Hoagland, Hoffman, Holmes, Holsman, Horner, Iliff, W. J., Iliff, W. M., Irick, Jarrard, Jenkins, Kinter, Lake, Lighthipe, Little, Ludlam, Martin, Moore, Nicholson, Nixon, Randolph, Reeves, Robins, Schenck, Seiffert, Stille, Taylor, Treadwell, Trusdell, Van Buskirk, Van Vorst, Van Wagoner, Ware, Weart, Willever, Wilson, Wright, Wurts, Young—65.

In the negative, were

Messrs. Bates, Birdsall, Bodine, Brinck, Cleaver, Crowell, Dickeson, Heulings, Landell, Lathrop, Peddie, Robison, Scovel, Staats, Stockton—15.

So the decision of the Chair was sustained.

The question then being upon the adoption of the Resolution offered by Mr. Holsman, and the yeas and nays being taken, resulted as follows:

In the affirmative were

Messrs. Abbett, L., Allen, Anderson, Boss, Broking, Chandler, Corey, Coriell, Culver, Demarest, Dougherty, Duryea,

Edsall, Goble, Haring, Hoagland, Hoffman, Holmes, Holsman, Iliff, W. J., Iliff, W. M., Kearney, Kinter, Little, Martin, Randolph, Robins, Schenck, Scudder, Seiffert, Stille, Taylor, Treadwell, Trusdell, Van Buskirk, Van Vorst, Weart, Willever, Wright, Wurts, Young—41.

In the negative, were

Messrs. Abbott, N. S., Acton, Bates, Beesley, Birdsall, Blauvelt, Bodine, Brinck, Buckley, Callahan, Cleaver, Crowell, Dickeson, Doughty, Fisher, Green, Harrison, Heulings, Horner, Irick, Jarrard, Jenkins, Kennedy, Lake, Landell, Lathrop, Lighthipe, Ludlam, Moore, Nicholson, Nixon, Peddie, Reeves, Robison, Scovel, Staats, Stockton, Van Wagoner, Ware, Wilson—40

So said Resolution was adopted.

Mr. Jenkins moved that the Joint Meeting do now adjourn *sine die*.

Upon which the yeas and nays were taken with the following result:

In the affirmative, were

Messrs. Abbott, N. S., Acton, Bates, Beesley, Birdsall, Blauvelt, Bodine, Brinck, Buckley, Callahan, Cleaver, Crowell, Dickeson, Fisher, Green, Harrison, Heulings, Horner, Irick, Jarrard, Jenkins, Kennedy, Lake, Landell, Lathrop, Lighthipe, Ludlam, Moore, Nicholson, Nixon, Peddie, Reeves, Robison, Scovel, Staats, Stockton, Van Wagoner, Ware, Wilson, Wright—40.

In the negative, were

Messrs. Abbett, L., Allen, Anderson, Boss, Broking, Chandler, Corey, Coriell, Culver, Demarest, Doughty, Dougherty, Duryea, Edsall, Goble, Haring, Hoagland, Hoffman, Holmes, Holsman, Iliff, W. J., Iliff, W. M., Kearney, Kinter, Little, Martin, Randolph, Robins, Schenck, Scudder, Seiffert, Stille, Taylor, Treadwell, Trusdell, Van Buskirk, Van Vorst, Weart, Willever, Wurts, Young—41.

So said motion was not agreed to.

Mr. Holsman moved that the Joint Meeting do now proceed to the election of United States Senator,

Which was agreed to.

Whereupon Mr. Holsman nominated the Hon. John P. Stockton, of the county of Mercer.

Mr. Kennedy nominated the Hon. James W. Wall, of the county of Burlington.

Mr. Doughty nominated the Hon. Peter D. Vroom, of the county of Mercer.

Mr. Jenkins nominated the Hon. Henry S. Little, of the county of Monmouth.

Mr. Scovel nominated the Hon. F. T. Frelinghuysen, of the county of Essex.

Mr. Ludlam nominated the Hon. John C. Ten Eyck, of the county of Burlington.

Mr. Little declined being a candidate, and desired his name withdrawn.

Under the direction of the Chairman, the Secretary called the Joint Meeting, resulting as follows:

For John P. Stockton, were

Messrs. Abbett, L., Allen, Anderson, Boss, Broking, Chandler, Corey, Coriell, Culver, Demarest, Dougherty, Duryea, Edsall, Goble, Haring, Hoagland, Hoffman, Holmes, Holsman, Iliff, W. J., Iliff, W. M., Kearney, Kinter, Little, Martin, Randolph, Robins, Schenck, Scudder, Seiffert, Stille, Taylor, Treadwell, Trusdell, Van Buskirk, Van Vorst, Weart, Willever, Wurts, Young—40.

For John C. Ten Eyck, were

Messrs. Abbott, N. S., Acton, Bates, Beesley, Birdsall, Blauvelt, Bodine, Brinck, Buckley, Callahan, Cleaver, Crowell, Dickeson, Fisher, Green, Harrison, Heulings, Horner, Irick, Jarrard, Lake, Mandell, Lathrop, Lighthipe, Ludlam, Moore, Nicholson, Nixon, Peddie, Reeves, Robison, Staats, Stockton, Van Wagoner, Ware, Wilson, Wright—37.

For James W. Wall, was

Mr. Kennedy—1.

For Peter D. Vroom, was

Mr. Doughty—1.

For F. T. Frelinghuysen, was

Mr. Scovel—1.

For Henry S. Little, was

Mr. Jenkins—1.

The Hon. John P. Stockton having received a plurality of all the votes cast, was declared duly elected United States Senator for the term of six years from the fourth day of March inst.

[After appointing several State officers,]

Mr. Holsman moved that the Joint Meeting do now rise.

Which was agreed to.

ATTEST:

JOHN H. MEEKER,
Secretary of the Joint Meeting.

Two general propositions arise under this statement of the provisions of the United States and State Constitutions; the statute of the State; and the proceedings of the "Legislature in joint meeting assembled;" viz :

I. WAS THE SENATOR SO ELECTED "CHOSEN BY THE LEGISLATURE" OF THE STATE?

II. WAS THE "TIME, PLACE, AND MANNER" OF HOLDING SUCH ELECTION PRESCRIBED BY THE LEGISLATURE IN THE SENSE OF THESE WORDS, AS USED IN THE CONSTITUTION OF THE UNITED STATES?

Under the first proposition it will be necessary to inquire:—
First. What is the Legislature of New Jersey? and Second. Did the Legislature make a choice?

First. What is the Legislature of New Jersey?

The Constitution of New Jersey, Art. IV, Sec. 1, Clause 1, provides: "the legislative power shall be vested in a Senate and General Assembly."

Art. IV., Sec. 1, clause 3. "The two Houses shall meet separately on the second Tuesday in January next after said day of election."

But the Constitution also provides for the meeting of the two Houses not separately but in joint meeting.

Art. VII., sec. 2, clause 2. "Judges, &c. shall be appointed by the Senate and General Assembly in joint meeting." Clause 3. "The State Treasurer, &c. shall be appointed by the Senate and General Assembly in joint meeting."

Art. V., clause 2. In a certain case the Governor shall be chosen "by the votes of a majority of the members of both Houses in joint meeting."

But the question recurs: When met in joint meeting, are the two Houses still the Legislature?

Art. IV., sec. 5, clause 1, provides that "No member of the Senate or General Assembly shall during the term for which he was elected, be nominated or *appointed* by the Governor or by the *Legislature in joint meeting*," &c.

Art. V., clause 12. "Where a vacancy happens during the recess of the Legislature in any office which is to be filled by the Governor and Senate, or by the Legislature in joint meeting, the Governor shall fill," &c.

The Journal of the Constitutional Convention in New Jersey shows that the clause cited above, from Article IV, when originally reported by the committee, did not contain the words "*Legislature in joint meeting*," but simply said "during the time for which he was elected or appointed." It was amended in committee of the whole by inserting after "appointed" the words "*by the Governor and Senate, or by the Legislature.*"

On motion of Mr. Ewing, (page 150, Con. Journal,) the amendment was amended by striking out *Legislature*, and inserting *joint meeting*.

On motion of Chief Justice Hornblower, (page 151, Con. Journal,) it was again amended by inserting before "*joint meeting*" the words "*Legislature in.*"

The very object of this amendment was to conclude this question which had been raised in reference to the Constitution of some other States.

These passages from the Constitution of New Jersey, (which *only, can define what is the Legislature of the State*,) show conclusively that an election by the joint meeting is an election by the Legislature. But the Senate of the United States, from 1789 to the present time—the last seventy-six years—has recognized the joint meeting of the New Jersey Legislature as the Legislature thereof, whatever may be the Legislature of other States. Every Senator from New Jersey has been elected by the joint meeting under the rules prescribed by the same or a similar statute. Unless the joint meeting is the Legislature, we never have had a United States Senator from New Jersey.

Second. Did the Legislature make a choice?

"The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*, for six years." This establishes the body of electors. It has no reference to "manner" of selection. "*Chosen by the Legislature*" is *elected* by the Legislature. It is the *Legislature*, not

the people, who are to choose. “*Eligere*,” to take out or elect, to call out one thing before another; to select. “*To choose*” is “*to elect*.”

That the words are used in the Constitution as synonyms is manifest from other clauses of the same instrument: “Who shall not when ‘*elected*,’ be an inhabitant of that State for which he shall be ‘*chosen*.’ ”

The times, places and manner of holding “*elections*” for Senators and Representatives shall be prescribed “in each State by the Legislature thereof, but the Congress may at any time, by law, make or alter such regulations, except as to the places of ‘*choosing*’ Senators.”

“The Senate shall ‘*choose*’ their other officers, and also a President pro tempore.”

“Each House shall be the judge of the *election*, returns, and qualifications of its own members, &c.”

“No Senator or Representative shall during the time for which he was ‘*elected*.’ ”

“The House of Representatives shall be composed of members ‘*chosen*’ every second year.”

“No person shall be a Representative who shall not, when ‘*elected*,’ be an inhabitant of that State in which he shall be ‘*chosen*.’ ”

“The House of Representatives shall ‘*choose*’ their Speaker.”

Yet under this last clause it is to be noted that Howell Cobb and N. P. Banks were each “*chosen*” by a plurality vote Speakers of the House.

The first clause of the fourth section of the first article is as follows:—“The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law, make or alter such regulations, except as to the place of choosing Senators.”

It is well known that this clause of the Constitution was assailed in the State Conventions, on the ground that Congress might contrive the manner of holding elections so as to exclude all but their own favorites from office.

The Conventions of the States of Virginia, Massachusetts, New Hampshire, New York, Rhode Island and South Carolina accompanied their ratification of the Constitution with a solemn protest against the power of Congress over the election. They prepared amendments to the Constitution calculated to carry out their views, and recorded on their journals perpetual instructions to their Representatives in Congress to urge earnestly and zealously their adoption, and to refrain from the exercise of any power inconsistent with the principles of the proposed amendments.

Judge Story, in his Commentaries on the Constitution, section 826, after having stated the objections to the latter part of the clause which were made at the time of the adoption of the Constitution, and the reasoning by which they were met, thus concludes:—"A period of forty years has since passed by, without any attempt by Congress to make any regulations or interfere in the slightest degree in the elections of members of Congress. If, therefore, experience can demonstrate anything, it is the entire safety of the power in Congress, which it is scarcely possible (reasoning from the past) should be exerted except upon very urgent occasions. The States now regulate the time, the place, and the manner of elections in a practical sense exclusively. The manner is very various; and perhaps the power has been exerted in some instances, under the influence of local or party feelings, to an extent which is indefensible in principle and policy. There is no uniformity in the choice or in the mode of election. In some States the Representatives are chosen by a general ticket for the whole State; in others they are chosen singly in districts, &c., &c. In some States the candidate must have a majority of all the votes to entitle him to be deemed elected; in others (as it is in England,) *it is sufficient if he has a plurality of votes*. In some of the States the choice is by the voters *viva voce* (as it is in England;) in others it is by ballot. The times of the elections are quite as various,—sometimes before and sometimes after the regular period at which the office becomes vacant. That this want of uniformity as to the time and mode of election has been productive of some inconvenience

to the public service cannot be doubted, for it has sometimes occurred at an extra session a whole State has been deprived of its vote, and at the regular sessions some districts have failed of being represented upon questions vital to their interests. Still, so strong has been the sense of Congress of the importance of leaving these matters to State regulation, that no effort has been hitherto made to cure these evils, and public opinion has almost irresistibly settled down in favor of the existing system."

Contrary to the prediction of the learned commentator, Congress passed an act, in 1842, entitled "An act for the apportionment of Representatives among the several States according to the sixth census," the second section of which provides that in every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of representatives to which the State may be entitled. The authority under which Congress made this provision was the fourth section of article first, the latter part of which says Congress may at any time make or alter the State regulations in reference to the manner of choosing Senators and Representatives.

When the law of Congress passed, New Hampshire, New Jersey, Alabama, Georgia, Mississippi and Missouri had election laws requiring their Representatives to be elected by general ticket. New Jersey and Alabama conformed to the law of Congress. It was insisted that the elections of New Hampshire, Georgia, Mississippi and Missouri under the State law were void. The debate on the subject occupied a large part of the session. The majority of the committee to whom it was referred reported that the law was unconstitutional, and the members elected on general ticket entitled to their seats. The minority reported that the law was valid, and the seats should be declared vacant. Neither report was formally agreed to, but it was voted by a decided majority that the members retain their seats. The reports were both prepared by gentlemen of great ability,—the majority report by Stephen A. Douglas, and that of the minority by Garret Davis.

But both the majority report of Mr. Douglas, and the minority report of Mr. Garret Davis agree so far as the question concerns the right of the Legislature to prescribe any manner, where Congress does not exercise its privilege. The State Legislatures *shall* prescribe the times, places and manner.

“An imperative duty,” says Mr. Douglas, “rests upon the Legislatures, whilst a mere privilege is granted to Congress. In the performance of this duty, the Legislatures are clothed with a wide discretion, upon which the Constitution imposes *no restraints*. They may provide for elections by general ticket, or in districts; for voting by ballot, or viva voce; for opening the polls at one place and on one day, or at different places and on different days. These and all things pertaining to the times, places and manner of holding elections are confided to the wisdom and discretion of the several Legislatures, to be performed in such manner as they shall deem most favorable to popular rights and just representation.”

He alludes to the fact that when General Pinckney proposed in the Convention which formed the Constitution, that the representatives “should be elected in such manner as the Legislatures of each State shall direct,” he urged among other reasons in support of his plan, “that this liberty would give more satisfaction, as the Legislature *could then accommodate the mode to the convenience and opinions of the people.*”

Mr. Davis says: “Some of the States have passed laws regulating their election of Senators; others have not; and yet the constitutionality of the regulations of the latter States for holding their elections of representatives has not been and cannot be questioned. *Such States as have no regulations by law for the Senatorial elections may make them also; so Congress could pass a law requiring the election of Senators generally; for that would be an alteration of the election regulations of some of the States by adding to them.* Congress could thus establish uniformity *in the mode* of electing Senators, by enacting a law requiring both branches of the State Legislatures to choose by their aggregate vote, and might confine its action to that or any other particular regulation for the election

of Senators. That principle has generally prevailed in Senatorial elections, &c. The State Legislatures might alter their existing regulations relating to time, or place, or manner, confining their action to either one."

The report illustrates the meaning of the expression "chosen" by the Legislature, as used in the Constitution in reference to Senators, and "chosen" every second year by the people of the several States, in reference to Representatives, insisting that this is only an indication of *the body of electors*, not the manner of elections, or the absurdity follows, that the people of *every State* not only have a right, but are bound to "choose" the House of Representatives.

It is manifest that the only object of this clause was to establish the body of electors, both as to Senators and Representatives.

The House is composed of members "*chosen*" every second year "*by the people*" of the several States, and the time, place and manner of the choice is to be prescribed by the State Legislatures.

The Senate is composed of two Senators "*chosen by the Legislature*" for six years, at the time, in the place, and by the manner prescribed by the Legislature.

Chosen "*by the people*" is always by a plurality vote in New Jersey, the Legislature has so prescribed.

Chosen "*by the Legislature*" is as the Senate and Assembly, in whom our Constitution has vested all legislative power, shall prescribe, and in failure of a special rule prescribed, the rule of the body is prescribed by parliamentary law.

The times, places, and manner for holding elections for Senators and Representatives *shall be prescribed in each State by the Legislature thereof*.

In some of the States it is prescribed by statute that the election shall be by concurrent action, in some by joint vote, in others an effort is first made to elect by separate action, and on failure thereof resort is had to joint meeting. Some States require a majority of all the members elected to choose a Senator, some only a majority of those present and voting,

some leave the number of votes necessary to the joint meeting, to determine either by rule for that purpose, or parliamentary law, while some States it would seem have never passed any law on the subject, and must therefore prescribe the manner at the time by the action of the body electing.

NEW YORK.—Such election shall be made by the Legislature in the following manner: The Senate and Assembly shall each openly nominate one person for the office of Senator in Congress; after which they shall immediately meet, and if they shall agree in their nominations, the person so nominated shall be appointed to the office for which he shall be nominated. If they shall disagree, the election shall be made by the joint ballot of the Senators and Members of Assembly.

PENNSYLVANIA.—By joint ballot; and a majority of the members present required to elect.

VERMONT.—First by separate vote, and if the same person does not receive the majority of all the votes in each house, then by joint ballot; and a majority of all the votes of the joint assembly required.

NORTH CAROLINA provides that the election shall be by joint vote of both Houses of the General Assembly, the vote being *viva voce*; and it is necessary to have a majority of the votes of both Houses to elect.

WISCONSIN elects by joint vote, declaring in section 2 of the act; a majority of all the votes given, shall be necessary to elect a Senator.

IN MICHIGAN.—The Senate and House shall each openly nominate one person for the office of Senator, after which, they shall immediately meet in joint convention in the hall of the House. If they shall agree, the person so nominated shall be deemed elected. If they shall disagree, the election shall be made by a joint vote of the Senators and members, and a majority of the *votes given* in such convention shall be necessary to an election.

LOUISIANA elects by joint vote; “and the person or persons having the greater number of votes, shall be declared duly elected Senator or Senators, provided such number be a majority of all the members present.

KENTUCKY.—Senators in the Congress of the United States shall be elected by *viva voce* vote of the members of the two branches of the General Assembly in joint ballot.

ALABAMA.—A majority of the whole number necessary to a choice.

INDIANA.—Hereafter all elections of United States Senator and other officers to be elected by the General Assembly of this State, shall be *viva voce*; except certain officers specified, who are to be elected by joint ballot.

MARYLAND.—By joint ballot; and the person or persons qualified, and having a majority of the votes of *all attending members* in both branches shall be declared duly elected.

ARKANSAS.—Joint vote; majority of all the *votes given* required.

CALIFORNIA.—Joint vote; a majority of all the *votes given*, necessary to elect a Senator; and the convention can do no act but adjourn in the absence of a majority of all the members elect, of either Senate or Assembly.

IN MISSISSIPPI, the act is as follows: An act prescribing the time, manner and place of holding elections for Senators to Congress.

At the regular session of the General Assembly of this State next preceding the expiration of the term of a United States Senator, or at any other session in which a vacancy or executive appointment shall be reported by the Governor, shall be *the time* of electing United States Senators. The *manner* shall be by vote of each member of the Senate, and each member of the House of Representatives in the State Legislature, and the place of holding such election, shall be in the hall of the House of Representatives of this State, and the particular day and hour of such election shall be determined in each case by a joint resolution of both Houses.

IN RHODE ISLAND.—It is provided that Senators shall be elected by General Assembly in grand committee, and not in separate houses. The name of each member shall be called aloud by the clerk; he hands in a ballot and responds the name

aloud; nothing said about the number of votes necessary to a choice.

DELAWARE.—Elects in joint meeting, requires a majority of all the *votes given* as necessary to a choice; but if upon any balloting, two persons only shall be voted for and receive all the votes, and each of them an equal number of votes; the Speaker of the Senate shall give *an additional casting vote*, unless he shall be one of said persons, in which case the Speaker of the House of Representatives shall give an additional casting vote, unless he shall be the other of said persons; and further, if upon twice balloting, more than two persons shall be voted for, and one of said persons shall on each balloting receive one-half the number of all the votes given, then on the second ballot, the Speaker of the Senate may give an additional casting vote to the person having one-half the number of all said votes, unless he shall be such person, &c. &c. &c.

It will be observed that New York, Kentucky, Mississippi, Indiana and Rhode Island, as well as New Jersey, require no particular numbers of votes, leaving the Legislature to manifest their choice in the manner they determine by their own rules.

Louisiana declares first the “plurality” rule, “the person having the greatest number of votes shall be declared duly elected,” but subsequently provides that such number must be a majority of all the members present.

The law in Delaware is really a “plurality” law; for, where two persons have an equal number of votes, or one person shall have *half* of all the *votes given*, the Speaker gives *an additional casting vote*. Now if it be true, as is alleged, that “chosen by the Legislature” means that at least a majority of the members should select the candidate, by directly voting for him, the permission to the Speaker to vote *twice* does not accomplish that necessary object. But if it is the “choice of the Legislature,” manifested in any way the majority may see fit that is required, the object is attained. And if a majority may not express their choice by a plurality vote, this act of Delaware is unconstitutional.

Again, if it is a majority of all the members which is required,

the laws of Pennsylvania, Michigan, Missouri, Arkansas, Maryland and Wisconsin are unconstitutional, for the majority of a quorum can elect under them. If, for example, the number of members of any of the Legislatures of these States is eighty-one, a majority of the whole number is a quorum, viz: forty-one; a majority of the quorum is twenty-one members. Therefore, twenty-one members out of eighty-one members, under the law of all these States, are capable of choosing a Senator.

The rule requiring only a majority of the members voting has frequently been the rule of the joint meeting of New Jersey, and under it they elected a United States Senator in the year 1851, by *less than a majority*, and his right to his seat was never questioned. In this election the joint meeting first adopted a rule requiring a majority of the whole number; they subsequently rescinded it for a majority of those voting, and elected by thirty-nine votes.

In the case under consideration at present, they adopted the rule requiring a majority of the whole number, and rescinded for the plurality rule, and elected by forty votes.

During the argument in Harlan's case, 34th Cong., 3d sess., Mr. Hale said:—"It is said it is impossible to make anything else the Legislature than the Legislature. That is true; but does any gentleman here contend that it was not competent for the people of Iowa to say that less than a majority should constitute a quorum if they saw fit so to do. I apprehend not. In the Legislature of the State of Massachusetts, when the House of Representatives consisted of some four hundred or five hundred members, sixty of them constituted a quorum, and when the Senate consisted of forty members, sixteen formed a quorum. Sixteen Senators and sixty Representatives might pass a bill or do any other legislative act, but nobody ever supposed that was an infringement of the constitutional provision that the Legislature must do certain things."

In the above case, cited by Mr. Hale, thirty-one members in the House might express the will of the five hundred members; and in the Senate nine members might express the will of the forty members; and thus the voice of forty members was the

voice of a Legislature which was composed of upwards of five hundred members.

The act in New Jersey simply says, Senators of the United States on the part of this State shall be appointed "by the Senate and General Assembly in joint meeting assembled." There is no constitutional restriction, no restriction on the "manner." The joint meetings have from the earliest record always made their own rules—at one time requiring a majority of all elected, at another time a majority of those present, electing to some offices without a ballot, sometimes by acclamation, sometimes by silence. On this occasion they first required a majority of all elected; they then by a majority vote rescinded that resolution and adopted one declaring that the plurality rule should prevail, and the person who had the most votes should be declared elected. *Now the question is, whether the Senate of the United States shall make retrospectively, rules to govern the joint meeting of New Jersey, or whether it can by a majority vote prescribe the manner of indicating its choice.*

The same clause that prescribes that the time, place and manner of holding elections for Senators shall be prescribed in each State by the Legislature, provides also in the same words for the election of Representatives. Yet Representatives in New Jersey are always elected by a plurality vote, and the statute declares that the Board of State Canvassers shall proceed to determine the person or persons who shall by the greatest number of votes have been duly elected; yet, under this very clause of the Constitution, every member of Congress from New Jersey has always been elected by a plurality. *Now suppose the statute relating to the election of Senator had prescribed the plurality rule to the joint meeting, would it not have been valid? Certainly, if the general election law is valid. Yet, if it is, as charged, in violation of the Constitution for the joint meeting to make such a rule, it must be in violation of the Constitution for the Legislature to prescribe it, and hence the election of Representatives from New Jersey has always been unconstitutional. The plurality rule has been the rule in such elections in most of the States. The States of Maine and Massachusetts*

were exceptions, but the inconvenience of the majority rule in electing Representatives was so great, that it induced an amendment of the State Constitutions of these States. But suppose that the majority is necessary to appoint a Senator. The "*manner*" in which the majority *manifests* that choice, in failure of any restriction of the Constitution of the State or of the United States, is certainly confided to their discretion, whether they vote by ballot or *viva voce*; whether by rising or sitting; whether by permitting a plurality to indicate their choice, or requiring a majority of all the members elected, it is for them to decide. They did decide, that they "*chose*" the candidate who on the coming ballot should receive the most votes. It was not an unreasonable manner, for it was the rule adopted by the general election law of the State. It was the manner in which members of Congress were elected under the same clause of the Constitution of the United States which imposed upon them the duty they were engaged in performing.

The Constitution of the United States commanded the Legislature to prescribe the manner of electing Senators. The Legislature by general enactment directs that the Senate and General Assembly, in joint meeting assembled, shall perform that duty. The Constitution of New Jersey vests all legislative power in the Senate and General Assembly, and recognizes them as the Legislature when in joint meeting assembled. By custom dating before the Constitution of the United States, and continued to the present day, the first act of the joint session has been to prescribe the rules for the government of that body. Under these circumstances can it be gravely insisted that the majority of this body was incompetent to make such a rule?

But if they had no power from their Legislative character, or from immemorial custom, to perform the duty confided to them, by the adoption of rules which seemed to them calculated to attain the ends in view; still they were bound by parliamentary law, and were clothed, at least, with that authority, which appertains to all deliberative bodies. Mr. Cushing says, C. IV, §3, "In all collective bodies of men, assembled and acting together for the purpose of deliberating, and deciding upon any subject,

or for the purpose of selecting to any office, it is an admitted principle, that whatever is done or agreed to by the greater number shall stand as *the act or the will of the whole*." Section VI, "The law of the majority is universally admitted in all Legislative assemblies, unless in reference to particular cases, persons or circumstances, a different rule is prescribed by some paramount authority, *or is agreed upon beforehand and established* by the Assembly itself, by which a smaller number is permitted, or a larger number is required to do some particular act. But even in these cases *it is the will of the majority* that governs; *because it is by a major vote* in the first instance, that the rule itself is established." In Part VI, Chapter 3, section 1826:—"Every question which is propounded to a legislative assembly for its determination, and voted upon in any of the manners described, receives its decision according to the preponderance of the votes, which, unless some other rule is expressly prescribed, as there usually is in each assembly in reference to particular questions, is ordinarily effected by a majority. In those cases where the rules or customs of any assembly allow a vote to remain on an equal division, the decision, as neither side preponderates, is necessarily in the negative. In many cases it is provided, either by a constitutional requisition, *or by rule*, that particular questions, in order to prevail, shall require more, *or admit of less*, than the ordinary majority in their favor."

The forty votes given for Mr. Stockton—no one else having more than thirty-seven—was, then, an indication of the *will of the majority*, and that was *the will of the whole*. Every member elected was present and voted; no protest or objection was made. The result is that "the Legislature," and every member of it, voted for, chose and appointed Mr. Stockton. The question is clearly *within the principle* of the case from Florida, which was unanimously decided by the Senate. The result of that case was to establish the principle that, until Congress shall pass an act on the subject, the State Legislatures may choose their own methods for the election of United States Senators. In this case it appeared that a poll *viva voce* was taken of the members, pursuant to the requirements of the Constitution of the State, and twenty-nine res-

ponded David L. Yulee, and twenty-nine blank ; whereupon, the presiding officer declared that no choice had been made ; they then proceeded to a second and third vote with substantially the same result. On the 15th of January they again met in convention for the same purpose, and upon a call of the roll, thirty-one members responded S. R. Mallory and twenty-seven voted for Mr. Yulee and others. Whereupon the president declared Mr. Mallory to be duly elected. Neither the record nor any other evidence in the case shows that any objection was made at the time. The certificate of election was granted to Mr. Mallory, and he, having been qualified, held the seat.

Mr. Yulee contested the seat on the ground that he was himself elected at the first vote, because there was a quorum of each House present, and he being the only qualified person voted for, had a majority of the legal votes. Those who responded "blank," voted for no qualified person, and waived their rights.

Mr. Mallory opposed to this inference a resolution of the two houses, adopted in 1845 by concurrent vote, which had never been rescinded, and was in the following words :

"Resolved, That a majority of all the members elect, composing the two Houses of General Assembly, shall be necessary to determine all elections devolving upon that body."

The whole number of members elect was fifty-nine, and Mr. Yulee not having a majority of that number was not elected, if the rule was binding and valid.

Mr. Bright, on behalf of the committee to whom the Florida case was referred, made a report, which says:—"It may be observed that the power given to the Legislature to regulate the time, place and manner, applies as well to Representatives as to Senators ; and here again are other diversities in the manner of exercising it. *Some States elect by a plurality of votes ; others by a majority, and others have required at the first trial a majority, and a plurality afterwards.* Some again (until Congress made a law upon the subject,) elected by a general ticket, others either by a single district or districts, entitled to more than one according to convenience. None of these modes of electing Senators or Representatives have been held unconstitutional, but mem-

bers have been uniformly admitted to their seats, whether elected in one or more of these modes. These practices have at all times existed, and have uniformly been recognized as constitutional, proving clearly that the discretion reposed in the Legislatures of the States may be exercised in a diversity of ways, and yet be a sufficient compliance with the requirements of the Constitution. With these views, the committee recommend the adoption of the following resolution :

“*Resolved*, That the Hon. Stephen R. Mallory was duly elected a member of the Senate of the United States from the 3d day of March, 1851.”

After lengthy debate the report of the committee was adopted and the resolution UNANIMOUSLY passed.

Mr. Toombs, in Harlan's case, (Cong. Globe, 3d session 34th Congress, p. 299,) says :—“Iowa has a perfect right, until Congress acts, to prescribe the mode in which her State Senators and Representatives shall cast their votes, as she pleases. It ought to be fixed, not as the Senator from Maine says, by the particular Legislature which elects. There is nothing in the Constitution like that. Power is given to ‘*Congress*,’ and in exactly the same words to the ‘*Legislature*,’—*any* Legislature which may be lawfully constituted under the Constitution of Iowa. There is perfect and absolute power on this subject in the Legislatures in the States until Congress acts. When Congress chooses, it can define how those persons whose duty it is under the Constitution to elect Senators, shall do so. The State Legislatures can exercise the right. It can be done by majority, *or by a plurality*, or in any way, so that all the electors are allowed to vote, and none are deprived of their right.”

The 1st article of the Constitution of the United States enacts that the House of Representatives shall “choose” their “Speaker” and other officers.

In reference to an election for Speaker, Mr. Cushing says : “In regard to the number of votes necessary to elect, it seems to be a rule established at least by practice and usage, that nothing short of an absolute majority will be sufficient, even in those States where the election of other officers takes place by

a plurality.” But he adds in a note: “In the House of Representatives in Congress the Speaker has always been elected without any previous order of the House, or provision of law to that effect, but simply in virtue of a resolution of the House to proceed to the election of a Speaker. On one occasion, and the only one it is believed that ever took place, the principle was departed from, the election of speaker of the House in the 31st Congress, contested principally between the Hon. Robert C. Winthrop, of Massachusetts, who had been Speaker of the last House, and the Hon. Howell Cobb, of Georgia. That memorable contest began on the 3d of December, 1849, and ended on the 22d, after sixty-three ballotings. Previous to the last balloting a resolution was adopted, that at the next trial, in order to insure an organization *a plurality should be sufficient to elect*. At the last balloting Mr. Cobb received 102 votes out 222, and was accordingly declared elected.

It is well known that after a much more severe struggle in 1856, Nathaniel P. Banks, Jr., on the one hundred and thirty-third ballot was elected Speaker under the plurality rule, having only 103 votes out of 214.

Now it will be remembered that in the House of Representatives the Speaker has always been elected without any previous order of the House, while in New Jersey the joint meeting have always made their own rules.

That an absolute majority by parliamentary law is required for a presiding officer where all other appointments may be made by a plurality.

That the Speaker is required to be “*chosen*,” as well as Senators under the Constitution.

If a plurality has twice elected or “chosen” a Speaker of the House, cannot a plurality when a majority has so ordered, elect or choose a Senator?

It may be urged that the consequences which would follow from permitting less than a majority of the whole to elect, furnish a conclusive argument against it. That if two members vote for one person, and every other member by himself for different individuals, the person having two votes would have

a plurality, and two votes might elect. That this argument is mere sophistry is easily manifested :

1st. The question is, whether the New Jersey Legislature in joint meeting assembled had the *constitutional right* to choose a Senator by adopting by a majority vote a plurality rule? This argument amounts to no more than that there might be cases "*where the rule would be inconvenient.*" It is an argument *ab inconvenienti* alone, and might be properly urged to prevent the adoption of the rule, but it does not touch the question of *power* on the part of the joint meeting to make it.

2d. After the majority had adopted the rule by parliamentary law, 2 votes were 41, and 41 were 81. The majority adoption of the rule is the solemn pledge that they will accept the result as their own act. *They vote for the candidate who has the plurality, in advance.*

3d. The argument from inconvenience applies equally to the election of members of the House of Representatives ; if a conclusive argument in one case it is so in the other, for it is the same clause in the Constitution under which the elections are held, and from which the power is derived, and the consequence is that our election law and that of nearly every other State is unconstitutional, and we have never had a constitutional House of Representatives.

4th. The majority rule did exist in Maine and New Hampshire, and was abolished as the *most inconvenient of the two.*

5th. Nearly all the State appointments made by the joint meeting are made with only two or three voting ; sometimes no vote is taken at all. It is done by agreement and consent, yet the silent assist in choosing the persons appointed. By way of example, in the joint meeting which elected Mr. Stockton, on motion of Mr. Holsman it was "resolved that the vote for county judges and commissioners of deeds be taken by acclamation, and that the counties in which vacancies exist, be called in alphabetical order." When, on motion of Mr. Lake, a list of ten gentlemen were appointed commissioners.

6th. That under the laws of at least six of the States where a majority of those present are permitted to cast the vote, a

majority of a quorum may elect, *and the majority of the Legislature may not be present and voting at all.* That under a similar rule the joint meeting of New Jersey have elected a United States Senator who took his seat unquestioned.

II. WAS THE "TIME, PLACE AND MANNER" OF HOLDING SUCH ELECTION PRESCRIBED BY THE LEGISLATURE IN THE SENSE OF THESE WORDS AS USED IN THE CONSTITUTION OF THE UNITED STATES?

There is no objection to the "time and place," the only question is, was the "manner" prescribed in the sense intended by the Constitution of the United States?

Neither the words "time" or "place" affect the question whether a majority of votes, or less, is necessary to a choice.—The whole objection must be to the defective prescription of the "manner."

If the word "manner" has no reference to number of voices that shall elect, then the failure of the Legislature to prescribe the number of voices necessary to a choice, is no objection to the indication, by the joint meeting, of the number of voices by which the will of the majority shall be expressed. In the absence of any Legislative rule as to the number of voices necessary, the joint meeting, as a deliberative body, had full power under parliamentary usage, to determine, by a majority of its members, the number of votes which shall indicate their choice. In the present instance they declared that the vote of a plurality should indicate their choice; that vote indicated Mr Stockton. He was therefore the choice of the joint meeting in the manner indicated by the majority.

But if the word "manner" does relate to the number of voices necessary to a choice, then has no "manner" ever been prescribed by the Legislature of New Jersey, by concurrent action, but such "manner" has always been prescribed by the rules of the "Legislature in joint meeting assembled." No Senator has therefore, ever been elected from New Jersey. All such elections having been void.

The Legislature may prescribe by other means than a law.—It may exercise its authority by joint resolution, by rule and by ordinance. And each House prescribes rules for its own government. Under them the voice of the House may be taken in a variety of ways;—by acclamation, by tellers, by rising and by yeas and nays. When the action of either House is reported to the other, they cannot inquire into the means by which such action was arrived at; that is, controlled by the bodies themselves. Upon what principle then can the “joint meeting” be debarred from exercising the same privilege? The rules of the Senate cannot bind them, for they are not the Senate; nor can the rules of the House, for the same reason. Yet there must be rules or there would be anarchy.

Suppose, however, for the sake of the argument, that the “Legislature in joint meeting assembled,” is not the Legislature alluded to by the Constitution of the United States, when it directs that the “manner” of choosing Senators shall be prescribed in each State by the Legislature thereof; that the joint meeting although competent to elect, could not prescribe the “manner;” and you are driven to the inevitable conclusion that “*the manner*” as the expression is used in the Constitution, does not necessarily include within its meaning the regulation of the number of votes necessary to a choice, for the act in several other States, as well as New Jersey fails to prescribe the number of votes necessary, and the manner therefore *has never been prescribed* in any of these States by the *Legislature*. Consequently, no Senators have ever been constitutionally elected therefrom.

It seems then that the “Legislature when in joint meeting assembled” are competent to prescribe the “manner” of election under the Constitution, *or*, “the manner” was sufficiently described by the statute. One or other of these propositions must be true. In either case, the constitutional requirement is complied with.

“The Legislature, in joint meeting assembled,” was the “manner;” by the statute, and the number of votes requisite to a choice—as well as the method of making the result of the indi-

vidual choice of its members the choice of the Legislature, and properly manifesting it,—were questions of custom and parliamentary law; the authority to decide which, was inherent in the body from the necessity of the case, and was, moreover, an incidental power, resulting from the duty imposed by the Constitution of the United States, and the “manner” prescribed by the Legislature.

Although the Legislature in joint meeting assembled, may not be able to pass a law or do any act which the Houses are required to do separately; when it is admitted that they can elect a Senator, it necessarily follows that they can pass rules for their governance *while in the performance of that duty*.

Mr. Fessenden said, in Harlan’s case, (34th Cong., 3d sess.,) speaking of the inherent powers of a Legislature when assembled in joint meeting:—“The Convention being formed * * * it remains to inquire what were the incidents of the Convention itself. A Convention has certain legal incidents. It has the power to adjourn if it is legally formed. It has the power to decide what shall constitute a quorum, if there is no overruling constitutional provision on that point. It has the power to organize. It has the power to decide who shall preside over it. It has the power of perpetuation, unless its existence is terminated by a superior power at a certain time. Then this Convention being assembled, whether under the statute or not, on coming together, had these incidents: *the power of deciding how the Senator should be elected*; a power of deciding what should constitute a quorum; the power of deciding that it might adjourn from day to day, *or do anything else that it saw fit to do*, and was not prohibited from doing, by any provision of the Constitution of the United States.”

The Constitution of the United States says “the times, places and manner of holding elections for Senators, * * * shall be prescribed in each State by the Legislature thereof;” but it is silent as to the *particular mode* whereby such “times, places, and manner” shall be prescribed; and when an act is required to be done without any limitation as to form, the body required to perform such act, may select any form it chooses. The Le-

gislature, therefore, may perform the duties imposed upon it in this instance either by statute, by concurrent resolution, by joint resolution, by ordinance, or by rule in joint meeting assembled. They are not confined to the mode by statute, for a statute requires the sanction of the Governor, and the Governor is no part of the "Legislature." But the second clause of the same section of the Constitution says "Congress may at any time, *by law*, make or alter such *regulations*." Here the *manner* in which Congress may perform this act, is expressly provided. It is "*by law*," *i. e.* by statute; but the more comprehensive word "*regulations*," *i. e.* rule, order, or law, is used when referring to the mode prescribed by the Legislature, viz: "may * * * alter such *regulations*." The Legislature, therefore, under the Constitution of the United States, having full power to prescribe "the times, places, and manner" in any way it shall see fit, neither the Senate, nor the Congress of the United States can dictate to it the mode in which such duty shall be performed. Congress may "by law," under the Constitution, "make" regulations of its own, or "alter" those already made by the Legislature, but it cannot interfere with the Legislature in its selection of the *mode* by which it will perform the duty imposed upon it by the Constitution of the United States, and if Congress cannot interfere, much less can the Senate of the United States. As well might the Legislatures of the several States attempt to dictate to Congress the modes in which they shall execute the powers, which have been granted by the several States to the Union.

Mr. Badger, in the discussion of the Florida case, says:—"The Constitution of the United States bestows upon the Legislature the power of prescribing the time, place and manner of electing the Senators and members of the House of Representatives. It confers upon them the whole jurisdiction, the entire power of making the law in regard to elections. The gentleman (Mr. Yulee) has stated that only the formalities of an election, the orderly *method merely of conducting it*, is committed to the Legislature, *but not the law of elections*. This, surely, is not so. Does not the Constitution of the United States give them the

whole power? Certainly it does. The State has the power to prescribe the time, place and manner of the election; but Congress, the only other authority over the subject, has power only to regulate these three things. If, then, these do not include the whole power, then the whole power is not by the Constitution conferred at all. But this cannot be; and hence, subject only to the control of Congress, the State has the entire power over the subject."

Again he says:—"Now we must recollect that on this subject we are dealing with a transaction which took place in Florida. In a legislative body of that State, which not only has power to prescribe its own rules, but also to decide judicially upon the existence and operations of a rule, so far as their elections are concerned."

Again he says:—"Now whether these twenty-nine votes are to be considered as votes of assent, or no votes at all, depends entirely upon the laws and usages of the State of Florida. The Congress of the United States not having exercised the power which, under the Constitution, they might exercise, to interpose regulations in regard to the election of Senators, *this election depended exclusively upon the rule prescribed by the Legislature of Florida*. An attempt is made to show that there is something in the decisions of other States and tribunals, something in the nature of a general parliamentary law, which controls the State of Florida on this point, and fixes the character of assent upon these blank votes, or makes them nullities. Permit me to say, that if it were shown that every other State in the Union, or on the face of the earth, had laid it down as a rule that blank votes should be rejected, or counted as votes of assent, this would not in the slightest degree affect this election, if a different rule or practice has prevailed in Florida; for Florida, in the absence of any legislation by Congress, has as absolute a right to prescribe a rule or adopt a practice of her own, as to the mode of signifying assent or dissent, as any other tribunal, or legislature, or authority on earth. So that the question at last comes around, not as to what is the rule of the Legislature of New York or Rhode Island, but what is the rule established by the

Legislature of Florida? That is the only question. *Allow me to remark that this Senate has no jurisdiction to prescribe any rule or to control any rule that has been prescribed in a State; our function is purely judicial; we are to judge of the election,—to say whether a party has been elected according to the rules or practice prevailing in the State from which he comes.*”

It has been the uniform custom for the Legislature of New Jersey in joint meeting assembled, to make rules for its government. Mr. Stockton was chosen under the rules adopted by the joint meeting.

Delegates to the Continental Congress were elected in New Jersey in joint meeting before the adoption of the Constitution of the United States. Senators have always been elected in joint meeting, and no joint meeting has ever assembled in New Jersey that did not adopt rules for its own government. Both under the old and new Constitution of New Jersey, the acts of the Legislature which prescribed the “manner” of election of United States Senators fail to go into detail as to the form of taking the sense of the joint meeting, because by both Constitutions, the two Houses are clothed with *all Legislative power, and are a constitutional Legislature when in joint meeting assembled*, and because the custom derived from parliamentary law for them to make the rules for the joint meeting, in joint meeting, each meeting for itself, was older than the Constitution of the United States.

A brief historical examination of this question will place it beyond doubt.

The Constitution of the United States went into operation March 4th, 1789.

The old Constitution of New Jersey, which remained in force until 1844, went into operation 2d July, 1776.

That Constitution vested the government in a Governor, Legislative Council and General Assembly. After providing for the election of the two branches of the Legislature, it declares that the Council and Assembly jointly, at their first meeting after each annual election, shall by a majority of votes, elect some fit person within the colony to be a Governor for one year,

who shall be constant President of the Council, and have a casting vote in their proceedings.

The articles of confederation became obligatory on all the States in March, 1781. They declared that delegates should be *chosen in such manner as the Legislature of each State should direct.*

Accordingly by an act passed in 1783, section 22, it was enacted that the Council and Assembly in joint meeting at the first sitting of the Legislature after the annual election, and at any other time when the same may be necessary, shall elect and choose any number of delegates not less than three nor more than seven, to represent this State in the Congress of the United States, and shall agree upon the form of credentials to be given them of their appointment, *which credentials* signed by the chairman of the joint meeting, shall authorize the said delegates to sit and vote on the part of this State, in the Congress of the United States, during the year or time for which they are elected, unless in that time superseded by a new appointment; and it was further enacted in section 25, that no person shall be hereafter elected, a delegate to represent this State in the Congress of the United States, unless he hath been a freeholder within this State for at least three years, and an inhabitant of the same for at least seven years next before his election, and worth one thousand pounds in real and personal estate within this State. In addition, it was required that he should take before one of the judges of the court of common pleas of the State the oaths of abjuration and allegiance.

The joint meeting was established, then, by our old Constitution long before the Constitution of the United States. It was the instrument of electing our Governor.

By the Articles of Confederation the delegates were, almost in the language of the present Constitution of the United States, *to be chosen in such manner as the Legislature shall direct.* The Legislature directed *in Joint Meeting.* From 1781 to 1790, the Council and Assembly met sometimes in the house of Mr. Howell, in Trenton, in the library of the college at Princeton, in the Methodist Church, in the city of Burlington, and in other places.

They made their own rules in reference to all other matters except the number necessary to elect the Governor which was provided in the Constitution. In reference to other officers when no rule was adopted as to the number necessary to elect, they elected not by an absolute majority of the whole body, but by a majority of those present. In case a majority of those present was not attainable, the rules of practice required that only the two highest candidates should be voted for on the next ballot.—As, for example.

Nov. 25th, 1783. The Council and Assembly met at the house of Francis Witt in Trenton John Schurman having declined his appointment as Treasurer, the joint meeting proceeded to the election of another person in his room. Ephraim Harris, Moore Furman and James Mott were nominated. Harris had 14; Furman, 6; Mott, 20. “Whereby it appears that neither candidate had a majority of the votes *present*; therefore, the two highest were voted for again.”

This rule of the joint meeting, requiring the name of the lowest candidate to be dropped, was only one means of expressing the will of the majority. It compelled certain members either to remain silent, or cast their votes for one of the two highest candidates. Strictly speaking this is only another means of declaring that the candidate who in reality is but the choice of a minority of the members, should be formally declared to be the choice of a majority. A majority of the members present being unable to agree in their choice of an individual, consent that the parliamentary rule requiring a majority shall be complied with, by compelling certain of the members to forego their preference. In order to do this certain members must voluntarily surrender their rights, otherwise no determination could be arrived at by the majority. Is not this only another, and a more arbitrary manner of declaring that the choice of a plurality shall be the choice of a majority of the whole?

The rule which appears to have been always adopted at the commencement of the session was:

“*Resolved*, That the election of State officers during the

present session be *viva voce*, and that all officers be put in nomination at least one day before the election."

In reference to delegates, the usual entry is in this form :

"November 23, 1780. The Council and Assembly met at the house of Mr. Bergen, in Trenton.

"The joint meeting proceeded to the election of delegates to represent this State in Congress, and the votes being taken, the Honorable John Witherspoon, Abraham Clark, William Churchill Houston, William Paterson, William Barnett, Esquires, were duly elected."

And a resolution followed empowering them to vote and represent the State in the Congress of the United States of North America.

When then, in 1789, the Constitution of the United States became operative, the clause which left "the times, places and manner" of the election of Senators and Representatives to the Legislatures of the several States, was in accordance with the plan which had been thirteen years in use.

In 1790, on the 12th of November, the Legislature of New Jersey passed another act in reference to the duties required of New Jersey by the Constitution, entitled "An Act to prescribe the manner of appointing Senators of the United States, and electors of the President and Vice President of the United States, on the part of this State."

The first section is in these words: "Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, That Senators of the United States on the part of this State shall be appointed by the Council and General Assembly of this State in joint meeting assembled, on the first Tuesday of November of every year in which this State is authorized to elect a Senator of the United States, at the place where the Legislature shall then sit, and on such other day or days as may be appointed by the Congress of the United States." The act provides for the Governor's filling vacancies when the Legislature is not in session, the appointment of electors for President, and concludes: "That every person who shall be elected a Senator or elector on the part of

this State, *shall be commissioned by the Governor* of this State, or the person administering the government for the time being, under the great seal of the State.

There was a supplement passed in October, 1796, and the 18th of January, 1805, merely referring to the time of election, Congress having left the time, place and manner to the Legislature. They say as to Senators as they did in reference to delegates, "*by the Council and General Assembly of this State in joint meeting assembled.*" That Council and General Assembly under this Constitution being the Legislature, and under it, acting in joint meeting, to elect the Governor.

The joint meeting, November 13th, 1794, adopted for their government the rules and orders of the House of Assembly.—November 20th, 1794, fifteen rules and orders were adopted for the government of the joint meeting, which, with occasional additions and alterations, have been adopted since that time. They were as follows :

"1. That the election of State Officers during the present session be *viva voce*, unless when otherwise ordered; and that all officers be put in nomination at least one day before their election.

"2. That the chairman shall not be entitled to vote except in case of a tie, and then to have a casting vote.

"3. That the chairman attend carefully to the preservation of order and regularity in transacting the business of the joint meeting; that he shall not engage in any debate or propose his opinion on any question without leave of the joint meeting.

"4. That every member, when he speaks, shall stand up in his place, and address himself to the chair.

"5. That in all debates and proceedings the members observe the strictest decorum, and that if any one use indecent expressions, or utter any personal reflections, or otherwise offend herein, he be censured according to the nature and aggravation of the offence.

"6. That no debate ensue or question be put as a motion, unless it be seconded, when it shall be open to debate, and the same receive a determination by the question, unless it be laid

aside by the joint meeting, or motion be made to amend it, to postpone it, or for the previous question.

“7. The previous question shall be in this form: Shall the main question now be put; and until decided, shall preclude all amendment and further debate on the main question.

“8. If any motion contain more than one simple question, any member may have it divided into as many parts as there are distinct questions, if seconded in his motion.

“9. That no member speak more than twice on the same subject in the same debate without leave of the House.

“10. That all questions of order be determined by the Chairman, subject to an appeal to the joint meeting, when demanded by four members.

“11. That when two or more members rise to speak nearly at the same time, the Chairman shall decide who shall speak first.

“12. When any question is stated, and by the joint meeting agreed to be put, no member shall be at liberty to withhold his vote without the leave of the joint meeting.

“13. That the names of the members voting and for whom they have voted shall be entered on the minutes, if moved for and seconded.

“14. That the joint meeting may adjourn when the list of nominations is not gone through with.

“15. That re-appointments may be made without resignations or the commissions being expired, if the commissions of the persons to be re-appointed expire the same sitting in which the joint meeting shall be held.”

October 28th, 1796, it was resolved that the rules and orders established by the joint meeting on the 20th of Nov. 1794, as entered on their journal for that date be the rules for the government of this joint meeting until otherwise ordered.

In 1797, the rules of 20th of Nov., 1794 were adopted with an additional rule opening the doors of the gallery, &c., &c.

The journals of each year usually set out the rules in detail, but occasionally only refer to the portion altered, stating the

rules of the last joint meeting were adopted, with an exception, addition, or alteration, as the case might be.

On the 2d day of September, 1844, a new Constitution went into operation in New Jersey, which declared "the legislative power shall be vested in a Senate and General Assembly." In article 7, section 2, in providing for the appointment of civil officers, it says judges of the courts of common pleas shall be appointed by the "*Senate and General Assembly in joint meeting.*" So with the Treasurer and Keeper of the State Prison and other officers.

The joint meeting is, under our Constitution, the Senate and General Assembly, in which all legislative power is vested.

It is provided that the Governor shall be elected by the legal voters of this State, "*the person having the highest number of votes shall be the Governor.*" If two or more shall be equal and highest in votes; one of them shall be chosen Governor by the vote of a majority of the members of *Houses in joint meeting.*

The necessity for expressing that it should be a majority of both Houses in this case, excludes the idea of any restraint on the power of the joint meeting to make their own rules, as they had been accustomed to do in all others.

April 2d, 1845.—Peter D. Vroom, Henry W. Green, William L. Dayton and Stacey G. Potts were appointed to revise the laws, suggest amendments, &c.

The present act in reference to the appointment of United States Senator is to be found in their revision on page 806, as it is now in Nixon's Digest, page 547, as follows:

"1. *Be it enacted by the Senate and General Assembly of the State of New Jersey, That* Senators of the United States on the part of this State, shall be appointed by the Senate and General Assembly of this State in joint meeting assembled; and in case a vacancy or vacancies shall happen, by death or otherwise, at any time during the sitting of the Legislature, then and in such case, the vacancy or vacancies so happening shall be filled during such sitting, by the Senate and Assembly of this State; and if a vacancy or vacancies, by the death of either or both of the said Senators, or otherwise however, shall happen

during the recess of the Legislature, then the Governor of the State, or in case of his death, absence or other disqualification, the person administering the government for the time being, may make a temporary appointment or appointments until the next meeting of the Legislature, which shall then fill such vacancy or vacancies.

2. *And be it enacted*, That every person who shall be elected a Senator on the part of this State, shall be commissioned by the Governor of this State, or the person administering the government for the time being, under the great seal of the State."

The Legislature were no longer the Council and General Assembly, but the Legislative power had been vested in the Senate and General Assembly by the new Constitution, and they are commanded by the Constitution of the United States to prescribe the manner. Hence the changed form of the act.

In 1845, 1846, 1847, 1848, 1849 and 1850. The rules for the election were prescribed as they had been before the adoption of the new Constitution; sometimes adopting the rules of the last joint meeting, and sometimes altering them.

In 1851, after electing the officers in the usual way, the Journal states that the following rules for the government of the joint meeting were read, (and after setting them out at length,) Mr. Edward G. Rogers moved that the first rule be amended by striking out the words *viva voce*, and inserting the words by ballot in lieu of it; not agreed to. Adjourned to February 14, 1851.

Mr. Canfield offered the following resolution:

"That no person shall be elected to any office at any joint meeting during the present session, unless there be a majority of all the members elected personally present, and agreeing thereto." Resolution agreed to.

Nominations were made for Senator, 40 votes were necessary to a choice under the rule, no one receiving the requisite number, the joint meeting adjourned.

After various adjournments and efforts to elect, Mr. Hineline offered the following:

"*Resolved*, That the rules of the joint meeting requiring a

majority of *all the members elected to the Legislature* to elect any officer be rescinded and that *a majority of those voting* be sufficient to elect any officer to be appointed by this joint meeting. The motion being agreed to, a ballot was taken and a United States Senator declared elected by thirty-nine votes; they being a majority of all cast.

In 1852 they adopted fifteen resolutions which are set out in the Journal to govern the joint meeting, on motion of Mr. Alexander.

In 1853, the same, on motion of Mr. Sitgreaves.

In 1854, on motion of Mr. Mulford.

Some of the officers "chosen" by the joint meeting in nearly every session were chosen without a ballot or a poll—by acclamation as it was termed.

1855.—Mr. Allen moved that the rules of the last joint meeting be the rules for the government of the present joint meeting, until otherwise ordered. Motion was agreed to, and the rules were read and adopted.

Mr. Allen moved the following as an additional rule for the government of this joint meeting.

"That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared duly elected."

Motion agreed to, and rule adopted accordingly.

Mr. Roberts moved the following:

"*Resolved*, That this joint meeting will vote for the officers on nomination by voice, except for the Treasurer and Keeper of the State Prison—which officers shall be voted for by ballot, after the election of the other officers."

Mr. Allen moved to amend the resolution by striking out the words "by ballot."

Motion to strike out agreed to.

Mr. Hoxsey moved to amend the resolution by striking out all after "*Resolved*," and inserting, "that this joint meeting in voting for Treasurer and Keeper of the State Prison will vote

by ballot.” Motion to strike out and insert was not agreed to, &c., &c., &c.

1859—Mr. Buckley moved that the rules of the last joint meeting be adopted as the rules for the government of the present joint meeting, until otherwise ordered.

Mr. Chandler moved as an amendment to the said motion that the 12th rule of the last joint meeting be omitted, and that the vote on his amendment be taken by ballot.

Mr. Buckley moved that the vote be taken *viva voce*.

The vote was ordered to be taken *viva voce*; the amendment not agreed to, and the rules of the last joint meeting adopted.

In 1860, on motion of Mr. Buckley, the rules of last joint meeting were adopted and set out in the journal.

In 1861, Mr. Demarest moved that the rules of the last joint meeting be adopted as the rules for the government of the present joint meeting until otherwise ordered, which motion was agreed to, and said rules adopted as follows:

“1. That the election of State officers during the present session be *viva voce* unless when otherwise ordered.

“2. That the Chairman shall attend carefully to the preservation of order and regularity in transacting the business of the joint meeting, and that he shall not engage in any debate, or propose his opinion on any question, without leave of the joint meeting.

“3. That every member when he speaks shall stand up in his place, and address himself to the Chair.

“4. That in all debates and proceedings the members shall observe the strictest decorum, and that if any one use indecent expressions, or utter any personal reflections, or otherwise offend herein, he be censured according to the nature and aggravation of the offence.

“5. That no debate ensue, or question be put on a motion, unless it be seconded, when it shall be open to debate, and the same receive a determination by the question, unless it be laid aside by the joint meeting, or a motion be made to amend it, to postpone it, or for the previous question.

“6. The previous question shall be in this form: ‘Shall the

main question now be put?' and unless decided, shall preclude all amendments and further debate on the main question.

"7. If any motion contain more than one single question, any member may have it divided into as many parts as there are distinct questions, if seconded on his motion.

"8. That no member speak more than twice on the same subject in the same debate, without leave of the joint meeting.

"9. That all questions of order be determined by the Chairman, subject to an appeal to the joint meeting when demanded by four members.

"10. That when two or more members rise to speak nearly at the same time, the Chairman shall decide who shall speak first.

"11. When any question is stated, and by the joint meeting agreed to be put, no member shall be at liberty to withhold his vote without leave of the joint meeting.

"12. The names of the members voting, and for whom they have voted shall be entered on the minutes, if moved for and seconded; and the ayes and nays shall be entered upon the journal upon every question taken in the joint meeting, other than questions of appointment, when moved for and seconded by five members, except the vote be unanimous.

"13. That the joint meeting may adjourn when the list of nominations is not yet gone through with.

"14. The appointments or re-appointments may be made without resignation or the commissions being expired, if the commissions of persons in office shall expire the same sitting or within two months thereafter; *provided*, that when a new appointment is made, the person so appointed shall not be considered as in commission until the expiration of the commission of the former person whose place it is to supply.

"15. That in all questions the Chairman of the joint meeting be called upon to vote in his turn as one of the Representatives in the Senate or Assembly, but that he have no casting vote as Chairman.

"16. That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared to be duly elected."

It will be observed that in the second rule adopted in 1794, the chairman was not entitled to a vote, except in case of a tie, and then to have a casting vote; and by the fifteenth rule, as above, he votes in his turn as a member, but has no casting vote.

In 1862 Mr. Demarest moved that the rules of the last joint meeting be adopted for the government of this joint meeting.

On motion of Mr. Cook, the rules were read.

Mr. McGrath moved to amend so that the voting would be by ballot. The yeas and nays being demanded resulted 39 yeas, 40 nays.

So said amendment was not agreed to. The main question was then put and agreed to.

In 1863 on motion of Mr. Randolph, the rules of the last joint meeting were adopted for the government of this joint meeting.

In 1864 on motion of Mr. Buckley, the rules of the last joint meeting were adopted for the government of this joint meeting.

In 1865—the joint meeting that elected Mr. Stockton—the Journal says :

Feb. 15.—Mr. Holsman moved that the rules of the last joint meeting be adopted for the government of this joint meeting, except the 16th rule, for which he offered the following resolution :

Resolved, That no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both Houses of the Legislature.

Which was agreed to.

March 15.—The day to which the joint meeting had been regularly adjourned.

Mr. Holsman offered the following resolution and moved its adoption :

Resolved, That the resolution that no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both Houses of the Legislature, be rescinded, and that any candidate receiving a plurality of votes of the members present, shall be declared duly elected.

Which resolution was adopted by a majority of all the members elected.

So that the rules of this joint meeting were the first fifteen

rules adopted in 1861, and this last resolution in place of the sixteenth. That is, the plurality rule adopted in place of the rule requiring a majority of all elected which had been on the first day of the session of the joint meeting substituted for the 16th rule of the last joint meeting which required only a majority of those voting.

Enough has been said to show that the joint meeting in New Jersey have always made their own rules. Being the Legislature, under the Constitution, they needed no directions as to the rules of their joint action, but made them by parliamentary law, and custom dating before the Constitution and continued to the present day.

The Legislature acquiesced in the mode of the election, and unanimously ratified it as their choice.

The Journal shows that each House separately in the usual form, unanimously adopted a resolution to go into joint meeting. Every member of both Houses was personally present at the time specified in pursuance of the resolutions, and voted to establish rules for the government of the body in conformity with the uniform practice since the adoption of the Constitution of the United States. Among others: "That no candidate should be declared elected unless upon receiving a majority of all the members elected to both Houses of the Legislature." At an adjourned session, every member of the Legislature elected was present in pursuance of resolutions of the Houses to that effect, for the purpose of electing a United States Senator, when the vote was taken to rescind that rule, and substitute for it, a rule that any candidate receiving "a plurality of votes of the members present shall be declared duly elected."

This rule was adopted by a majority of all the members elected, every member elected present and voting. Mr. Stockton received forty votes, no one else receiving more than thirty-seven; there being four scattering votes.

Mr. Stockton was declared elected, in the presence of the whole Legislature; not one of whom expressed any dissent. The joint meeting transacted some other business and adjourned *sine die*; the Legislature was in session some fifteen days after

the adjournment of the joint meeting, and finally adjourned for the session without one word of protest.

Mr. Stockton was duly commissioned by the Governor of the State, under the great seal of the State as provided by the act.

This was the will of the Legislature expressed in the manner the majority had previously prescribed, and subsequently acquiesced in by all. It can, therefore, in no proper sense, be called a plurality election.

The two bodies met and gave a joint vote under a law which authorized it. The Houses separated; neither House objected; of course they both assented, and the election is valid.

It is a familiar rule, applicable to all elections, by political bodies, that the public declaration of the result of an election by the body itself or its presiding officer, with the acquiescence of every individual member, is conclusive.

It is also as well established that every individual member present at such public declaration of the result of the election, and at that time passing it *sub silentio*, acquiesces.

Multitudes of questions are determined in a legislative body without actual vote, merely by the declaration of the presiding officer, no member dissenting.

Cushing's Manual says, section 1792: "In order that any proposition may become the act or will of the House, it is necessary that it should receive the assent of a majority of the members, which may be manifested in two ways, namely, *either by no one objecting* to the proposition, in which case the sense of the House is ascertained by their common consent, the thing being sufficiently declared when no man contradicts it; or by a majority of the members declaring themselves in its favor." "*Consensus tollit errorum*, is a maxim of the common law, and the dictate of common sense, and it may be implied as well as expressed."

Broom, Maxims page 103, says: "Where at the trial of the cause, a proposal was made by the judge in the presence of the counsel on both sides, who made no objection, that the jury should assess damages contingently, with leave to the plaintiff to move to enter a verdict for the amount found by the jury, it

was held that both parties were bound by the proposal. and that the plaintiff's counsel was not therefore at liberty to move for a new trial on the ground of misdirection, for *qui tacet consentire videtur*, the silence of counsel implied then their consent to the course adopted by the judge."

In the Queen v. Green, 2 Q. B., C. J. Denman said: "I am of opinion that the objection here taken is good. It is not necessary to scan particular cases. The principle is, he that *concurred* in inducing a party to exercise an office cannot be heard in this court on an application in this court to turn him out of that office."

Lord Kenyon said in Rex v. Clarke, 1 East. 46: "The Court will not listen to a corporator who *has acquiesced* or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose."

In Cameron's case, 34th Congress, 3d session, it was alleged by the protestants that the Senate did not appoint a teller and perform other duties at the time prescribed by the statute. The report of the Committee on the Judiciary, submitted by Mr. Benjamin, contains the following language: "But where, as in the present case, both Houses proceeded without objection from any source to perform their constitutional duty of electing a Senator, the necessity of complying with any particular forms required by law may fairly be considered as waived by common consent, *and it is entirely too late, after the result of the voting has been ascertained, to raise a question as to the mode of proceeding.*"

Mr. Bayard said in Harlan's case: I can well understand that where a quorum votes, the acquiescence of the two bodies, after the election is made and after the severance of the joint meeting, precludes inquiry into the question of legality, because there is necessarily assent, in the same manner that we assent to votes taken here without a quorum, when no yeas and nays are called and no decision had. That principle is familiar in a variety of other cases. Acquiescence binds political bodies, and all other bodies. Where the contrary does not appear they are supposed to be present and to assent, not as a presumption of fact, but as

a presumption of law ; and a presumption of law is not controvertible by evidence. That is the meaning of what I say. *If when the vote has been taken a majority of both bodies being present, by a quorum, a person is declared elected, and no objection is made by the action of either House singly, and they separate, of necessity it is a presumption of law that the election was valid, and neither House can afterwards look into it.*

Mr. Bayard said, in the same debate, "I can understand perfectly well, under the principle of passing a measure *sub silentio* that we have no right to inquire into the question how members of the Legislature, whether of the Senate or House, voted in regard to the election of a Senator of the United States, if the certificate comes here authenticated according to the laws of the State. Where the two bodies meet and give a joint vote, under a law which authorizes the expressed will of a majority of the whole to govern, *and then the Houses separate and neither House objects to the election, of course they both assent and the election is valid.*"

Mr. Cushing says in his treatise on the law and practice of Legislative assemblies : "the rule of decision in all councils and deliberative assemblies, whose members are equal in point of right, is, that the will of the greater number present and voting—the Assembly being duly constituted—is *the will of the whole body*. Hence whatever is regularly agreed upon by a majority of the members of a Legislative assembly is a thing 'done and past' by that body."

The principle as universally admitted is again emphatically pronounced by the same high authority in Part 1st, Chap. IV, Section III, under the title "OF THE PRINCIPLE UPON WHICH THE RESULT OF AN ELECTION IS DETERMINED."

"In all collective bodies of men, assembled and acting together for the purpose of deliberating and deciding upon any subject, or for the purpose of electing to any office, it is an admitted principle, that *whatever is done or agreed to by the greater number shall stand as the act or will of the whole*. This principle assumes as its basis, the absolute and perfect equality of all the individuals one with another, who enjoy the right of suffrage, in

the possession of the elements essential to the determination of any act to be done, or to the formation of any judgment to be pronounced, *or to effecting any election* to be made as the act, judgment or choice of the whole." Again, Part VI, Chap. 2, Section 1792, says :—"In order that any proposition may become the act, or express the sense, judgment, opinion, or will of the House, it is necessary that it should receive the assent of a majority of the members, *or of such other number as may be agreed upon, or otherwise fixed beforehand* ; which may be manifested in two ways, namely : either by no one's objecting to the proposition—in which case the sense of the House is ascertained by their common consent, the thing being sufficiently declared when no man contradicts it ; or by a majority or the requisite number of the members declaring themselves in its favor,—in which case the sense of the House is ascertained by a question put and determined."

The act of the Legislature left the election to the expressed will of a majority of the joint meeting. That majority agreed that the "choice" of the Legislature should be indicated by the plurality rule. This was the will of the majority, their choice. It was the act, judgment, and choice of the whole. It is the "Legislature" that elects. Not the members thereof. They act under the rules that they may adopt, and the principles of parliamentary law as established by authority and usage. The question is not what any individual member prefers, nor how he manifests his preference. It is, what is the choice of "the Legislature" as legally manifested. As a private corporation acts under the common seal of the body, properly authenticated, the Legislature of New Jersey provides *how the result of their choice shall be manifested* to the United States Senate and to the world, by a commission under the great seal of the State.

When Mr. Stockton was declared elected in the joint meeting, according to the manner of choice agreed upon by the whole, it was notice that in the view of the presiding officer he was the choice of the Legislature, and that so would the Legislature speak by its only voice, the signature of the Governor, and the great seal of the State.

The declaration was assented to sub silentio.

The Governor was authorized by the Legislature, under the great seal of the State, to commission Mr. Stockton as Senator, for so they said all. If this election was not the will of the majority, why was the declaration that Mr. Stockton was duly elected permitted to pass in silence? If they desired to avoid the result of the plurality vote which they had previously agreed to, whether it was in their power to do so or not, they would have manifested it, if only to prevent the conclusion of unanimous consent.

Having the return, he is entitled to take his seat upon his credentials, beyond question. It is equally true that the fact that there was some error or mistake in giving the credentials, by which they did not properly express the choice of the Legislature, may be subsequently examined when properly brought before the United States Senate. But in order to raise even this question, it is manifest that the charge must be *that the credentials do not properly express the will of the Legislature at the time of the election*, while they were in session,—before they separated,—while the matter was pending. This is the foundation of the attack; no charge without it can authorize an examination. Admit that the Legislature agreed by a vote of a majority of the whole to select in this manner, to express their choice in this way; that when the result was reached they heard it announced and declared, approved it by unanimous consent, silently confirmed the result of the majority rule by the action of the whole, made it the duty of the Governor to commission the candidate declared to be elected under the great seal of the State, and you are estopped from attempting to prove that the election was invalid.

Individual members may change their mind after the joint meeting, and the Legislature had adjourned, and ceased to exist, but this cannot alter what was done by the Senate and Assembly when assembled in joint meeting.

The protest of individual members after the adjournment of the Legislature, affected in no manner the action of the Legislature in its official capacity. The majority of the Legislature

authorized the application of the plurality rule. Subsequent to its application, they confirmed and ratified their previous action by their silence when Mr. Stockton was declared duly elected. Their official power to question their action has expired. Their subsequent protest as individuals, could in no manner affect their official action as Representatives, though they might, in common with any other individual contest the validity of such Legislative action.

The Senate is the "judge of the elections, returns and qualifications of its own members," but in reference to the manner of the election; they are confined to the question, whether or not it was done as prescribed by the Legislature of the State. If both Houses have assented, there is nothing upon which the Senate of the United States can pass judgment.

From the foregoing examination the following propositions seem to be established:

First.—Senators of the United States are to be "chosen" by the Legislatures of the several States.

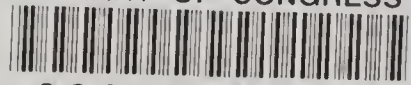
Second.—The "manner" of the choice is to be prescribed by the Legislature thereof.

Third.—The Legislature of New Jersey, by statute, indicated "the Senate and Assembly, in joint meeting assembled," as the "manner" in which the duty imposed upon them by the Constitution of the United States should be performed.

Fourth.—The Constitution of New Jersey recognizes "the Senate and Assembly, in joint meeting assembled," as the Legislature of the State.

Fifth.—"The Senate and Assembly, in joint meeting assembled," have full power to determine the "manner" of the election of a United States Senator, by the authority derived from the Constitution of the United States; the Constitution of the State; by virtue of the statute law of the State; by parliamentary usage, and by universal custom.

Sixth.—That if the joint meeting had not the power to prescribe the manner of choice, yet the "manner" being determined by the statute of the State, "the Senate and Assembly,



in joint meeting assembled," were authorized to indicate their choice by such rules as they might adopt.

Seventh.—The election of Mr. Stockton under the rules adopted by the joint meeting of 1865, *was not a plurality election, but was the choice of the majority*, expressed by the method indicated by them, so declared in the resolution previous to the election and subsequent to it, by the silence and acquiescence of all the members.

Eighth.—That the whole body confirmed the legal election of Mr. Stockton, and authorized the Governor, under the statute, to commission him as United States Senator for six years, from the 4th of March, 1865, and thereby the matter is concluded.